courts. But these courts are entirely creations of the legislature which may alter their jurisdiction as it sees fit. The fact that it has given to an equity court jurisdiction to set aside a will would seem at least *prima facie* evidence that there is no adequate remedy otherwise. Nor does the Supreme Court view its equitable jurisdiction illiberally. "The jurisdiction in equity attaches unless the legal remedy, both in respect to the final relief and the mode of obtaining it, is as efficient as the remedy which equity would afford under the same circumstances." *Kilbourn* v. *Sunderland* (1888) 130 U. S. 505, at p. 514. The fact that legal questions are also involved does not oust the court of jurisdiction if the remedy at law falls short of this. *Gormley* v. *Clark* (1889) 134 U. S. 338, at p. 349. These considerations lead to the conclusion that the Supreme Court would sustain the decisions in question. Its opinions contain dicta to that effect. *Gaines* v. *Fuentes* (1875) 92 U. S. 10, at p. 21. This case held that where an equitable action to annul a will would lie in the State courts it would be removable to the Federal courts, the requisites of Federal jurisdiction being present; not that an original bill would lie. Another dictum is in *Ellis* v. *Davis* (1883) 109 U. S. 485, at p. 496. Furthermore, dissents have always been in favor of such assumptions of jurisdiction. BROWN, J., dissenting in *Cates* v. *Allen* (1892) 149 U. S. 451, at p. 462, says: "I had always supposed it to be a cardinal rule of Federal jurisprudence that the Federal courts are competent to administer any State statute investing parties with a substantial right." In fact, of the present Supreme Court, besides BROWN, J., there are committed in favor of the jurisdiction, MCKENNA, J., *per* concurring opinion in *Richardson* v. *Green*, *supra*, and FULLER, Ch. J., *semble*, *per* opinion of court in *Gormley* v. *Clark*, *supra*. Nowhere, apparently, has it been noticed that this result is somewhat inconsistent with the two rules already pointed out, to which the Supreme Court is committed, that equity will not set aside the probate of a will, because there is an adequate remedy at law, and that a State statute enlarging equitable jurisdiction will not be available in Federal courts if there is such adequate remedy.

INJURIES RECEIVED WHILE OFF DUTY BY REASON OF THE NEGLIGENCE OF A FELLOW SERVANT. The theory on which the rule is based which exempts a master from liability when one of his servants is injured by the negligence of a fellow servant, is, as stated by ERLE, C. J., in *Tunney* v. *Midland R. Co.* (1866) L. R. 1 C. P. at p. 296: "A servant, when he engages to serve a master, undertakes, as between himself and his master, to run all the ordinary risks of the service, including the risk of negligence upon the part of a fellow-servant, when he is acting in the discharge of his duty as servant of him who is the common master of both." This theory was first advanced by SHAW, J., in *Farwell* v. *B. & W. Ry. Corp.* (1842) 4 Met. 49, and it has been generally adopted both in England and in this country, in preference to that of *Priestly* v. *Fowler* (1837) 3 M. & W. 1, "that a servant has better opportunities than his master of watching and controlling the conduct of his fellow-servants, and that a contrary doctrine would lead to intolerable inconvenience, and encourage servants to be negligent." Pollock on Torts p. 84. To apply this rule there

must be an accurate definition of "fellow-servant," and perhaps it is nowhere harder to define than when the servant, though in the general employ of his master, is, for the time being, off-duty.

The cases under this head naturally fall into groups. It is, in the first place, well settled that where a servant's day's work is done, and there is no relation remaining between him and his master, he is not then an employee in such a sense as to make the fellow-servant rule apply. *Fletcher* v. *Baltimore and Potomac Ry. Co.* (1897) 168 U. S. 135. But, on the other hand, though apparently off-duty, if there is any obligation on his part to respond to the master's call in an emergency, he is deemed to be an employee and to come under the rule. In *Russell* v. *Hudson R. R. Co.* (1858) 17 N. Y. 134, the court found that the plaintiff, though his day's work was done, and he was being carried home on the defendant's train, was yet expected, if needed, to assist in managing the train by applying the brakes, and therefore as he owed an obligation to be ready, he was considered as on duty. In *St. L., A. & T. Ry. Co.* v. *Welch* (1888) 72 Tex. 298, on the same theory, one whose day's work was done, and who was sleeping in a car on a side-track, but liable to be called at any moment, was held to be on duty. These two classes of cases represent the views on opposite sides of the line, and it is with the cases that fall between that difficulty is found. The first class of these are the so-called "conveyance" cases, where the servant is to be carried to and from his work in his master's conveyance. Such carriage is, in some cases, part of his remuneration, and in others a mere understanding incident to his contract. There has been much difference of opinion as to the relationship under such circumstances, but the general rule, if there be any, might be expressed as follows: "The employment begins when the servant enters the conveyance in the control of his master for the purpose of reaching the particular place where he is to work. The length of time before or after the hour for beginning work is not a guide. Thus, where a master by special arrangement with his employees, or by a method of conducting his business, which he has adopted, undertakes to transport his servants to or from their place of work, the employment begins and continues through that time." Dresser, Employers Liability § 13, p 75; *Tunney* v. *Midland Ry. Co. supra*; *Vick* v. *N. Y. C. & H. R. R. Co.* (1884) 95 N. Y. 267; *Gilshannon* v. *Stony Brook R. R. Corp.* (1852) 64 Mass. 228. Pennsylvania is the only state that decides directly the other way. *McNulty* v. *Penna. R. R. Co.* (1897) 182 Pa. St. 479. This rule, however, only includes those cases where the employee has entered the train for the purpose of going to or coming from his place of work. For, if he is traveling on his own business, though exercising his right of free carriage as an incident to his contract, he is not deemed an employee. As stated in *Doyle* v. *Fitchburg R. R. Co.* (1894) 162 Mass. 66, "a person may at one time be an employee when passing over a railroad, and at another time, in passing over the same road, be a passenger, though continuing all the while, in a popular sense, in the employment of the railroad company." The test is whether he is on his own or his master's business. This view was followed in *Dickinson* v. *West End Street Ry. Co.* (1901) 177 Mass. 365, and appears to be well recognized in other jurisdictions, *State* v. *Western Maryland Ry. Co.* (1884) 63 Md. 433.

We now come to the last class of cases to be considered, namely, where the plaintiff, though his day's work is done, is injured on his employer's premises. It appears to be settled that if he is on the premises on his own business as any stranger might be, as, for example, in crossing the tracks, or walking on them, he is not an employee. *Sullivan* v. *N. Y., N., H. & H. R. R. Co.* (1900) 73 Conn. 203. But it seems that if, in going to or from his work, it is necessary for him to pass over the premises owned or controlled by his master, he continues in the employment during that time. *Olsen* v. *Andrews* (1897) 168 Mass. 261; *Ewald* v. *Chicago & N. W. Ry. Co.* (1888) 70 Wis. 420.

This question is clearly presented by a recent case in the United States Circuit Court of Appeals. A servant assisting in the making of an excavation was sleeping in a tent near the work, when a piece of rock thrown by a blast, fell through the tent injuring him. It appeared that the plaintiff was boarded and lodged in the tent by the master, such board and lodging being received in part compensation for his services. At the time of the accident, the night shift to which he belonged was not at work. It was held that the fellow-servant doctrine had no application, inasmuch as at the time of the accident the plaintiff was not a fellow-servant of those to whom the master had delegated the duty of warning the plaintiff of blasts. *Orman* v. *Salvo* (C. C. A. 8th Circ. 1902) 117 Fed. 233.

An application of the rule stated in the beginning of the discussion, leads to a different conclusion from that reached by the court. For to say that a servant assumes all the risks incident to his contract, must in this case, include the use of the tent, which was part of the plaintiff's compensation. Nor can we apply the reasoning of the cases above cited, for, with one or two exceptions, there is an endeavor to find just how much the plaintiff assumed the risk. Where the accident happens while a right incident to the contract is being exercised, there is usually no recovery. The case illustrates the tendency of the courts to mitigate the harshness of the fellow-servant rule wherever possible. Various limitations have been placed on it in other classes of cases. Jurisdictions vary, but in the decisions we find limitations such as the application of the "vice-principal" theory, where the negligent servant is deemed to be doing a duty for his master, which the latter is not allowed to delegate, and where, consequently, the question of fellow-servants does not arise, *N. P. Ry. Co.* v. *Herbert* (1885) 116 U. S. 642; or, again, the "different department" theory, where the injured servant, not being in the same general class as the negligent one, is not deemed to be a a fellow-servant, *Ryan* v. *Chicago, etc., R. Co.* (1871) 60 Ill. 171; or where the master has chosen incompetent servants, *Evansville, etc. Ry. Co.* v. *Guyton* (1888) 115 Ind. 450; or where the negligent act is done by a superior servant, *Little Miami Ry Co.* v. *Stevens* (1851) 20 Ohio 416. It is also interesting, to note that many States have passed statutes, limiting the fellow-servant rule similar to the "Employer's Liability Act," first passed in England in 1880.

CANDIDATE'S NAME ON BALLOT MORE THAN ONCE.—Within recent years, the legislatures of several States have enacted laws declaring